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No. 94-906

In The

# Supreme Court of the United States

October Term, 1994

JOHN RICHARDS, as Conservator and Guardian of Leonard Richards,

*Petitioner,*

versus

MICHELIN TIRE CORPORATION,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY TO BRIEF IN OPPOSITION

ANDREW T. CITRIN
(Counsel of Record)
JAMES A. YANCE
MICHAEL A. WOREL
DAVID G. WIRTES, JR.
KELLI D. TAYLOR
CUNNINGHAM, BOUNDS, YANCE, CROWDER AND BROWN
Post Office Box 66705
Mobile, Alabama 36660
205-471-6191

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## I. THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THIS PETITION

There are "special and important reasons" to grant this petition. Under Supreme Court Rule 10.1, a special and important reason arises when a court of appeals "depart[s] from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). In the present case, the Eleventh Circuit "departed from the accepted and usual course of judicial proceedings" when it supplanted well-established Alabama law with its own philosophy towards punitive damages in violation of the *Erie* doctrine.[1] This Court should seize this opportunity to remind courts of appeals that they are duty-bound to comply with the *Erie* doctrine; otherwise, they may freely

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[1] Commentators have criticized the Eleventh Circuit for ignoring other precedential authority from this Court. William C. Porth and Robert P. George in *Trimming The Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. Va. L. Rev. 109 (1987), criticized the Eleventh Circuit for distorting the second prong of the *Lemon* test:

> "The Eleventh Circuit's opinion, in short, is intellectually shoddy. It distorts the very test (the second prong of *Lemon*) which it purports to apply. Then, in performing the application, it falls miserably short of the principled neutrality which it earnestly invokes. For those who find satisfaction in speculating on the philosophical motives that inspire ***result-oriented judges*** . . . , the opinion of the Eleventh Circuit should be a fertile object of study."

*Id.* (emphasis added).

disregard state substantive law without fear of reproval.[2]

Importantly, respondent characterizes Alabama law regarding wantonness as if it were unsettled and subject to debate. This characterization is groundless. At the time of the Eleventh Circuit's decision, Alabama law regarding wantonness was *well-settled*. Unfortunately, Alabama's substantive law did not meet the Eleventh Circuit's vision of what Alabama's law *should* be. Consequently, it created its own version of wantonness in Alabama. This refusal to apply controlling state substantive law violated the *Erie* doctrine. Therefore, this Court should exercise its supervisory power in order to remind the Eleventh Circuit, and other courts of appeals, of its duty under *Erie*.

## II. *SEARS* CONTROLS THE OUTCOME OF THIS PETITION

The Alabama Supreme Court's decision in *Sears & Roebuck Co. v. Harris*, 630 So. 2d 1018 (Ala. 1994), controls this petition. Respondent claims that *Sears* is "easily distinguishable" because of "additional evidence, none of which was present in this case." Brf. at 20. Although Mr. Richards will specifically address the "additional facts" which respondent alleges make *Sears* "easily distinguishable," it is important to note that when the Alabama Supreme Court listed the evidence which it determined sufficient to meet Alabama's standard of wantonness it

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[2] While his criticism was not limited to diversity cases, another commentator notes that courts of appeals have *improperly* reversed jury verdicts in *numerous cases*. *See* Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237.

enumerated only the facts which Mr. Richards included in his petition. *Compare Sears*, 630 So. 2d at 1032 *with* Pet. at 10 & 18. Specifically, the *Sears* court stated:

> "The evidence introduced by the plaintiffs to prove wantonness, however, belies the defendants' contentions. ***The plaintiffs presented evidence that*** **the dangers of carbon monoxide poisoning from gas appliances had been** *generally known in the industry* at the time the water heater was designed; that [defendants] had designed, manufactured, marketed, and distributed the . . . water heater to be installed by consumers; that ***[defendants] were actually aware that consumers were misinstalling gas water heaters*** by connecting them to LP gas and by failing to vent them properly; that ***[defendants] were actually aware that such improper installation had caused deaths*** and injuries from carbon monoxide poisoning; that ***a wrongful death action*** based on carbon monoxide poisoning caused by connection of a Kenmore II gas water heater to LP gas ***had been filed against [defendants] in 1981***; and that notwithstanding knowledge of these facts, [defendants] did not place ***any additional warning or instruction*** labels on the water heater or otherwise alter its design."

*Sears*, 630 So. 2d at 1032 (emphasis added). As Mr. Richards graphically illustrated with a chart in his petition, Pet. at 18, the evidence in this case meets and exceeds the evidence submitted in *Sears*. Therefore, Mr. Richards' reliance on *Sears* is not a "wrongful exaltation" of the decision, but, rather, is a proper dependence on controlling case law.

Even if, as respondent alleges, "additional facts" were considered in *Sears*, the "additional facts" provide further support for Mr. Richards' claim. Respondent stated: "*Sears* involved all of the following additional evidence, none of which was present in this case: (1) expert testimony that the defendant violated a published industry standard, (2) the complete lack of any permanent on-product warning addressing the danger at issue, and (3) a product specifically designed for installing by an untrained consumer (as opposed to a trained tire mounter)." Brf. at 20. In attempt to distinguish *Sears* from the present case, respondent actually makes Mr. Richards' case stronger.

The fact that the defendant in *Sears* did not comply with an industry standard does not make the present case and *Sears* incompatible. In *Sears*, the Alabama Supreme Court stated:

> "Addressing the defendants' more specific contention, we note that adherence to ANSI industry standards does not, *in and of itself*, relieve a manufacturer from liability for damages based on claims of wantonness, when other evidence clearly and convincingly shows that it knew of the risk of injury and death posed by its products. *Cf., King v. National Spa & Pool Institute, Inc.*, 570 So. 2d 612 (Ala. 1990). Compliance with such industry standards does not allow a manufacturer to close its eyes to injuries caused by its products and do nothing to alter their design or to warn users."

*Sears*, 630 So. 2d at 1032-33 (emphasis in original). Therefore, respondent's incessant references to its compliance with Standard 119 is ***immaterial*** when it "knew of the

risk of injury and death posed by its product," but did "nothing to alter its design or to warn users."

Additionally, respondent's attempt to distinguish *Sears* by claiming that in *Sears* there was a "complete lack of any permanent on-product warning addressing the danger at issue" is wholly without merit. In fact, **both Sears** and the present case involve manufacturers who failed to provide "permanent on-product warning[s] ***addressing the danger at issue.***" In *Sears*, although the defendant instructed consumers on how to install the heater, it did not warn consumers of the possible dangers arising from improper installation or foreseeable improper use.

Identical to *Sears*, respondent's placement of the statement "MOUNT ONLY ON APPROVED 16-INCH RIMS" was merely an instruction on how to mount the tire. This statement in no way adequately apprised consumers of the dangers involved with improper mounting. Therefore, in *Sears* and the present case, both manufacturers failed to adequately apprise consumers of the dangers inherent in their products.

Respondent also contends that *Sears* is distinguishable because it involved "a product specifically designed for installing by an untrained consumer (as opposed to a trained tire mounter)." Brf. at 20. Alabama law, however, provides that the defense of misuse is not available to a manufacturer if the misuse is foreseeable. *Kelly v. M. Trigg Enterprises, Inc.*, 605 So. 2d 1185, 1192 (Ala. 1992). Therefore, even if the tire was specifically designed for "trained tire mounters," respondent must adequately apprise all *foreseeable* mounters of the dangers involved.

In fact, the evidence established that respondent knew that unsophisticated and untrained users would be changing its tires. [R8-397]. Moreover, the industry as a whole deemed this danger to be so subtle and significant that even "sophisticated" users needed graphic warnings.[3] [R8-401]. Thus, because respondent did not adequately apprise "trained" or "untrained" users of the dangers of mismatches, *Sears* controls this petition.

Because the Eleventh Circuit ignored *Sears*, this Court should grant this petition and remind the Eleventh Circuit (and the other federal courts of appeals) of their obligation under the *Erie* doctrine.

## III. RESPONDENT DISTORTS ALABAMA LAW

Through careful placement of key phrases, respondent misrepresents Alabama law regarding wantonness, failure to warn, and design defect. With regard to wantonness, respondent states: "[T]he Eleventh Circuit properly considered the extraordinary statistical rarity of mismatch injuries as a factor in evaluating whether Michelin ignored an intolerable, pervasive problem." Brf. at 18. However, Alabama law does not require the number of incidences caused by a problem to be "intolerable" or "pervasive" to reach the level of wantonness. In fact, the Alabama Supreme Court has found sufficient evidence of

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[3] The evidence established that most of the 125 to 150 thousand copies of the *Tire Guide*, the industry's primary trade journal that included a graphic mismatch warning, were mailed to tire companies and retail tire stores, which generally employ only *trained* tire mounters. [R8-390-91].

wantonness ***without regard to any*** "statistical probability" of injury in a number of cases. *See Mead Coated Board, Inc. v. Dempsey*, No. 1921827, 1994 WL 154660 (Ala. April 29, 1994) (upholding a finding of wantonness based *solely* on the testimony regarding safer unloading procedures, even though defendant had *no prior knowledge* of any injuries); *Sears Roebuck Co. v. Harris*, 630 So. 2d 1018, 1033 (Ala. 1992) (upholding a finding of wantonness where defendant had only been sued *once* prior to the plaintiffs' injuries); *Savage Industries, Inc. v. Duke*, 598 So. 2d 856, 859 (Ala. 1992) (affirming a jury's finding of wantonness where the manufacturer only knew of *two* previous accidents).

Respondent also distorts Alabama's law concerning failure to warn. Respondent claims "no evidence whatsoever showed that Michelin knew that the rare mismatch injuries were caused by the lack of a more detailed sidewall warning." Brf. at 19. This assertion borders on the ridiculous. There is overwhelming evidence that respondent knew that mismatch injuries were caused by a lack of a sufficient sidewall warning. Although respondent claims the number of mismatch injuries were "rare," it reaches this conclusion by comparing the number of Michelin tire mismatch injuries which actually led to lawsuits to the total number of tires it manufactured. It is undisputed that respondent knew that numerous people had been injured by mismatches, *not just by its tires, but by numerous other manufacturers of 16-inch tires.* This was a serious problem in the industry; so serious, in fact, that the industry's primary trade journal distributed graphic warnings about mismatches and Ford *demanded* that all of its tire suppliers place warnings on the sidewalls of their

tires. Clearly, there was sufficient circumstantial evidence to show that respondent knew that the industry concluded that graphic warnings were necessary to apprise tire changers of the dangers of mismatches and that respondent consciously, intentionally, and deliberately refused to provide warnings to its users because it was afraid of creating a "dangerous legal precedent."

Lastly, respondent states that the second prong of *Beech v. Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991), requires "proof of 'greater overall safety.' " Brf. at 13. Once again, however, respondent misstates Alabama law. The second prong of *Beech* requires the plaintiff to prove that "the utility of the alternative design outweigh[s] the utility of the design actually used." *Beech*, 584 So. 2d at 450. This test allows the jury to weigh *all* of the factors of both designs to determine which is better, but does not require the plaintiff to prove "greater overall safety." Mr. Richards met his burden under *Beech* by showing that Michelin *itself* used the alternative design in some of its higher range 16-inch tires prior to the manufacturer of the 16-inch tire in question. App. at 17a n.17.[4]

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[4] Respondent accuses Mr. Richards of improperly citing to "nonexistent evidence" to support his alternative design claim. However, the evidence respondent complains of is found in the Eleventh Circuit's opinion. *See* Pet. at 17a. n.17.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

ANDREW T. CITRIN
(Counsel of Record)
JAMES A. YANCE
MICHAEL A. WOREL
DAVID G. WIRTES, JR.
KELLI D. TAYLOR
CUNNINGHAM, BOUNDS, YANCE,
CROWDER AND BROWN
Post Office Box 66705
Mobile, Alabama 36660
(205) 471-6191

*Counsel for Petitioner*